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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 418

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,

Petitioner,

vs.

PENNSYLVANIA WATER & POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT PENNSYLVANIA WATER & POWER COMPANY IN OPPOSITION

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Opinions Below.

The opinion of the Court of Appeals has not yet been reported. It will be found on pages 75-102 of Vol. III of the Record. The opinion of the District Court (Vol. I, p. 1)* is reported in 89 F. Supp. 452.

Jurisdiction.

The Petitioner has invoked the jurisdiction of this Court under U. S. C. Title 28, Sec. 1254.

* All such references herein unless otherwise indicated are to volumes of the Appendices forming part of the printed record.

Statement.

The Petition of Consolidated Gas Electric Light and Power Company of Baltimore (herein termed "Consolidated" or "Petitioner") presents no sound ground for the review by this Court of the decision of the United States Court of Appeals for the Fourth Circuit holding invalid the wholesale power agreement (herein sometimes called the Agreement) between Consolidated and Respondent, Pennsylvania Water & Power Company (herein termed "Penn Water"). Petitioner does not claim that the decision is in conflict with the decisions of the courts of any other circuit or that it presents an important Federal question which has not been, but should be, settled by this Court. The only claim (Pet., p. 24) is one, which cannot be sustained, that the decision is in conflict with the decisions of this Court on important points. On the contrary, it can readily be shown that the Court of Appeals applied the decisions of this Court in an orthodox manner.

The Petitioner not only does not present any sound ground for review by this Court, but it distorts the facts of the case and also the issues presented by the decision of the Court of Appeals.

A correct summary of the facts of the case taken from the record and from the findings of the District Court (from which Consolidated did not appeal) is contained in the Opinion of the Court of Appeals (Vol. III, pp. 75-82) and should be considered by this Court in lieu of the distorted statement contained in the Petition.

As appears from the Opinion below (Vol. III, pp. 78-79), Penn Water (a Pennsylvania electric utility corporation) and Consolidated (a Maryland electric utility corporation several times the size of Penn Water, and also in the gas and steam business), except for the Agreement the

validity of which is in issue, would be in substantial competition in the generation, transmission, purchase and sale of electric energy *at wholesale* in the States of Maryland and Pennsylvania and the District of Columbia, and at *retail** in the State of Maryland. Consequently, the attempt in the Petition to make it appear that Penn Water and Consolidated "operate upon different levels", "that Penn Water is solely a wholesaler", and "Petitioner is primarily a retailer"** (Pet., p. 9) is unfounded.

Through the Agreement, as the District Court found, Vol. I, p. 16, (a finding never controverted by Consolidated, and expressly approved by the Court of Appeals, Vol. III, p. 82), power was conferred upon Consolidated to control (1) the prices at which Penn Water may sell its product; (2) the extent to which Penn Water may expand its plant; (3) the territory in which Penn Water may sell its product; and (4) the purchases of electric energy by Penn Water, the latter control enabling Consolidated to require Penn Water to purchase energy only from Consolidated.

Both Courts also found (Vol. I, p. 21; and Vol. III, p. 79) that, through the Agreement, Penn Water and Consolidated agreed not to compete.

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* In the case of Penn Water, through its wholly owned subsidiary Susquehanna Transmission Company of Maryland, which has rights to give retail or wholesale service anywhere on its extensive lines in Maryland (Vol. III, pp. 78-79). Penn Water (through Susquehanna) formerly served the street railway in Baltimore, but that customer was taken away by Consolidated (Vol. III, p. 78). The transmission lines of the subsidiary in Maryland and of Penn Water in Pennsylvania are shown in red on the map (Pf's. Ex. 1, p. 34 of Pet.).

** Petitioner has over four times the generating capacity of Penn Water, and has substantial contracts for the sale of electric energy at wholesale and in bulk in the District of Columbia and in Maryland.

Both Courts also found as a fact (Vol. I, pp. 12-13; Vol. III, p. 82) that Consolidated had actually exercised its restrictive powers under the Agreement by interfering with Penn Water's contracts and by prohibiting Penn Water in the fall of 1948 from building a new steam electric generating plant, whereby coal from the Susequehanna River could be salvaged in large quantities and power economically produced.

Through the Agreement Penn Water surrendered managerial and charter powers over vital phases of its business and affairs to Consolidated and thereby disabled itself from performing its proper functions as a public utility corporation, as the Court of Appeals pointed out (Vol. III, pp. 97-100).

The Agreement was imposed on Penn Water in 1931, when Penn Water and Consolidated were both controlled by John E. Aldred and his associates, which control began at the time of organization of Penn Water in 1910 and continued until 1946 (Vol. III, p. 82; Vol. I, pp. 11-12, 13). The Agreement was made at a time when Penn Water was receiving more than half its revenue from sources other than Consolidated and was selling to such sources 40% of its energy (Vol. III, p. 80; Vol. I, p. 17).*

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* At the present time more than 50% of Penn Water's energy is sold to others than Consolidated and in 1948 Consolidated's payments to Penn Water amounted to less than 12% of Penn Water's operating revenue (Vol. III, p. 80). There is at the present time no common control of Penn Water and Consolidated; Penn Water is owned by about 7,000 stockholders, no one of whom owns or controls as much as 3% of the stock, and Penn Water now has an independent board of directors.

Consolidated was never the parent of Penn Water nor was it in any respect the financial backer of either the hydro or steam development at Holtwood or the transmission network owned by Penn Water, all of which were built by Penn Water by the use of funds obtained from the sale of its bonds and stocks to the public. Nor was any advance payment made by Consolidated under the Agreement, which is executory, power being deliverable day by day and payments therefor called for month by month.

By entering into the Agreement Penn Water and Consolidated, as the District Court found, formally agreed not to compete and thereafter did not compete (Vol. I, p. 21), and such Agreement "represented a combination and extension of less formal arrangements which had existed between Electric [Consolidated] and Power [Penn Water] since the latter's organization in 1910" (Vol. I, p. 11). The full text of the Agreement is contained in the unprinted transcript of record Vol. I, pp. 15-59, and certain of the illegal provisions are quoted in full in the Opinion of the Court of Appeals (Vol. III, pp. 80-81).

On the basic facts summarized above, and outlined in greater detail in the Court of Appeals Opinion, that Court necessarily determined, under controlling decisions of this Court, that the Agreement, on its face and on the findings of the District Court as to its effects, violated Section 1 of the Sherman Act and Section 3 of the Clayton Act and that the Agreement was invalid because Penn Water had thereby surrendered managerial and charter powers and disabled itself from performing its proper function as a public utility corporation contrary to (a) public policy as laid down in a long line of decisions of this Court and other courts, headed by the case of *Gibbs* v. *Consolidated Gas Company of Baltimore,* 130 U. S. 396 (1889)* and (b) the statutes of Pennsylvania.

Nor does the decision of the Court of Appeals that the courts have jurisdiction of the question of invalidity of the Agreement under the antitrust laws, and not the Federal Power Commission, deviate in any way from the

* The Agreement here represents an illegal attempt by Consolidated to throttle a competitor in the electric field, just as the agreement made by its predecessor in the *Gibbs* case years ago represented an attempt, condemned by this Court, to throttle a competitor in the gas field.

controlling decisions of this Court. The decisions of this Court have clearly distinguished between two different types of Federal regulatory statutes, one type (such as the Shipping Act of 1916 involved in the principal case* cited by Consolidated) expressly giving the regulatory commission power to give absolution from, and adjudicate questions under, the antitrust laws and the other type giving no such power. The Court of Appeals simply held that the statute here involved, the Federal Power Act, fell within the second category and did not oust the courts of jurisdiction to adjudicate questions under the antitrust laws.

The decision of the Court of Appeals was plainly correct on all points.**

Although immaterial to the disposition of this case, the Petition calls attention to a statement by the District Court that the motive of Penn Water in bringing this suit to challenge the validity of the Agreement was to prepare the way for Penn Water's withdrawal from interstate transmission and sale of electric energy, thereby escaping the jurisdiction of the Federal Power Commission over its rates for such services. As was pointed out to the Court of Appeals, there was not only no basis in the record for this statement of the District Court but, on the contrary, counsel for Penn Water had stated to the District Court (Vol. I,

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* *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U. S. 474 (1932).

** Following the trial, the District Court for Maryland (Coleman, J.) concluded that the Agreement did not violate the antitrust laws, in spite of its findings (described above at pp. 3-4) apparently on the theory that the two companies, having agreed not to compete and not having competed, could not be treated as competitors, and that the rule of *per se* illegality did not apply to the contractual restraints in the Agreement because the companies were regulated utilities.

The claim that the Federal Power Commission had primary jurisdiction over the question of invalidity under the anti-trust laws was never presented to the District Court by Consolidated. The District Court took jurisdiction at the instance of all parties, and decided the antitrust law question.

The District Court disagreed with the contention that the surrender of managerial powers under the Agreement was illegal.

pp. 88-89), on the authority of the Board of Directors and officers of Penn Water, that if the Agreement were held not to be valid, "Penn Water would forthwith file with the regulatory authorities a new tariff for the delivery of the same amount of power to Baltimore" under the usual type of arrangement between independent utilities without controls by one corporation over the other.

Clearly the motive of Penn Water in this suit was to free itself of the restrictions by Consolidated contained in the Agreement so that Penn Water might manage its own affairs and expand its facilities, business and services and properly serve the public, just as other independent electric utilities are doing.* The immediate occasion for Penn Water's serving the complaint of December 21, 1948, which challenged the Agreement, as appears from the letter from the Board of Directors of Penn Water to Consolidated attached thereto (Unprinted transcript, Vol. I, p. 300), was the refusal by Consolidated on November 23, 1948, to permit Penn Water under the Agreement to build the proposed new steam electric generating plant which Penn Water considered was needed for proper service to the public (Vol. I, p. 55, Complt. par. 29).

It is in the public interest that judgment be entered in accordance with the Court of Appeals' decision at as early a date as possible, so that Penn Water may proceed to expand its generating and transmission facilities, particularly the building of the new steam generating plant, in order to furnish the public with additional power so sorely needed

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* There is also no basis for the statement in the Petition (p. 22) that Penn Water before instituting this suit was "anticipating a decision from the Commission [Federal Power Commission] unfavorable to it". Nor are the so-called findings 5 and 6 of the District Court, quoted in the Petition (pp. 22-23), findings relating to the Agreement. They simply related to a change in physical operations which was the subject of a preliminary motion prior to trial.

in this time of national emergency and steadily increasing demand.

Throughout this case, instead of meeting the issues presented by the Complaint, Consolidated has resorted to raising new points for the first time in the appellate courts. In the Court of Appeals Consolidated for the first time made the untenable contention (Vol. III, p. 88) that the Federal Power Commission had primary jurisdiction to determine whether the Agreement was invalid under the antitrust laws. There for the first time Consolidated made the further contention that the Federal Power Commission had in fact passed on the issue when it clearly had not done so. On the matter of the application of the antitrust laws to the Agreement, Consolidated on appeal for the first time cited and relied on the inapplicable case of *U. S.* v. *Columbia Steel,* 334 U. S. 495 (1948), although the case had been decided more than a year before the trial of the instant case in the District Court. Again it was not until the case was on appeal that Consolidated took the position that "The Pennsylvania Commission has no standing" in the courts to claim the illegality of the Agreement (even if not estopped, a separate point previously made by Consolidated) although Consolidated had expressly consented to the intervention of the Pennsylvania Commission in the District Court on a complaint making that claim (Vol. III, p. 69).

Now in this Petition for the first time Consolidated makes additional new contentions. One is that the Federal Power Commission has primary jurisdiction to determine whether the Agreement is invalid *on any ground,* not solely the Federal antitrust laws (Pet., p. 4, Ques. 3 and p. 25). Another claim made for the first time in the Petition is an obvious attempt to create an apparent conflict of State and Federal law and a constitutional question, where none in

fact exists. Petitioner tries to make it appear that the Court of Appeals held the surrender of managerial and charter powers by Penn Water through the Agreement to be illegal solely by virtue of a Pennsylvania statute and Pennsylvania public policy, which allegedly is not in conformity with the Federal law and public policy as enunciated in the commerce clause of the Constitution of the United States and the decision of this Court in *P. U. C.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927), both mentioned for the first time in this case in the Petition. As shown in Point III below, the Court of Appeals held the surrender of managerial and charter powers by Penn Water to be illegal on much broader grounds, that is, public policy as laid down by this Court with which policy the Pennsylvania statutes are coextensive.

Questions Presented.

The Petition distorts the questions presented, interlards them with argumentative matter, and attempts to raise questions not presented to either of the Courts below. A succinct statement of the real questions follows:

(1) Is the Agreement invalid under the Federal antitrust laws (Sherman Act, Section 1, and Clayton Act, Section 3) on its face and on the findings as to its effects made by the Courts below?*

(2) Does the Federal Power Act deprive the courts of jurisdiction to determine the invalidity of the Agreement under the Federal antitrust laws?**

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* Pet. Quest. 1 and 2, purged of argumentative matter.

** Pet. Quest. 3. This question was raised for the first time in this case by Consolidated on appeal to the Court of Appeals. Now for the first time in this Petition Consolidated tries to raise the additional question whether the Federal Power Act deprives the Courts of jurisdiction to determine the invalidity of the Agreement *on all grounds.*

(3) Is the Agreement invalid because thereby Penn Water surrendered managerial and charter powers and disabled itself from performing its proper functions as a public utility corporation?*

Reasons for Denying the Writ.

The sole ground alleged in the Petition (p. 24) for the granting of a writ is that the decision of the Court of Appeals is in conflict with the decisions of this Court. It can readily be shown that the claim of the Petitioner is incorrect and that the decision below properly applied controlling decisions of this Court.

Argument.

I. The decisions of this Court establish the invalidity of the Agreement under the antitrust laws.

The Courts below found that under the Agreement Consolidated had power (1) to control the prices charged for electricity by Penn Water, (2) to control the expansion of Penn Water's plant and thus its output of electricity, (3) to control (a) the customers to whom and (b) the territories in which Penn Water might sell electricity (Vol. III, p. 82; Vol. I, p. 16) and (4) to foreclose Penn Water from a substantial market (Vol. III, p. 84). Consequently, the

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* Pet. Quest. 4, 5 and 6, purged of argumentative matter.

The Petition also claims that there is presented the question whether the *Pennsylvania Commission* is estopped from asserting the invalidity of the Agreement. (Pet. p. 6, Quest. 7.) This question cannot be a real issue because Penn Water also, throughout the case in each court, raised the same question of invalidity and it is not claimed by Consolidated that Penn Water is estopped. The District Court held that Penn Water was not estopped (Vol. I, p. 15). Consolidated did not appeal from that, or any other portion, of the decision of the District Court. And, of course, the Pennsylvania Commission cannot be estopped from asserting illegality of the Agreement under Pennsylvania law.

Court of Appeals held that the Agreement was unlawful *per se* under the Sherman Act (Vol. III, pp. 82-84).

The decisions of this Court establish that such an agreement is unlawful *per se* under the Sherman Act.*

The Courts below also held that under the Agreement Consolidated has the power to prohibit Penn Water from purchasing electricity from other utilities and thus to require Penn Water to purchase electricity exclusively from Consolidated (Vol. III, pp. 82, 84; Vol. I, p. 16). The Court of Appeals, therefore, held the Agreement invalid under Section 3 of the Clayton Act (Vol. III, p. 84).

This Court has consistently held such agreements to be invalid under the Clayton Act irrespective of "economic merits or demerits."**

Instead of discussing the decisions of this Court relating to the types of *contractual restraints* contained in the Agreement and which hold such restraints *per se* illegal, Consolidated calls attention to a wholly inapplicable line of decisions by this Court relating to the acquisition by one company of the business and assets of another, or arrangements not involving *contractual restraints* of the type contained

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* *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 220-224 (1940); *U. S.* v. *Real Estate Boards*, 339 U. S. 485 (1950); *U. S.* v. *Paramount Pictures*, 334 U. S. 131, 143 (1948); *International Salt Co.* v. *U. S.*, 332 U. S. 392, 396 (1947); *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707, 720 (1944); *U. S.* v. *Masonite Corp.*, 316 U. S. 265, 274-276 (1942); *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392, 397-8 (1927). See also decision of Special Statutory Court in *U. S.* v. *Aluminum Co.*, 148 F. 2d 416, 427 (1945), and the decision of the Court of Appeals for the Fourth Circuit holding an agreement containing similar restraints between two regulated utilities to be invalid under the antitrust laws, *Norfolk Southern Bus Corp.* v. *Va. Dare Transp. Co.*, 159 F. 2d 306 (1947), cert. den. 331 U. S. 827 (1947).

** *Standard Oil Co. of California* v. *U. S.*, 337 U. S. 293, 299, 314 (1949); *Fashion Guild* v. *F. T. C.*, 312 U. S. 457, 468 (1941); *International Salt Co.* v. *U. S.*, 332 U. S. 392, 396 (1947).

in the Agreement, where this Court tested the legality of the transaction by the rule of reason.* The Court of Appeals held that the line of cases dealing with acquisitions was not applicable to these contractual restraints (Vol. III, pp. 84-85).

Consolidated argues that the Agreement is beneficial to it and to the public and needed for Consolidated's protection. Where an agreement is illegal *per se,* such claims, even if supported, are immaterial, as the Court of Appeals held (Vol. III, p. 85). This principle is well established by the decisions of this Court.**

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* The *Standard Oil* case, 221 U. S. 1, the *Paramount* case, 334 U. S. 131, and the *Columbia Steel* case, 334 U. S. 495 (Pet., pp. 26-27), applied the rule of reason to determine whether the defendants were monopolizing or restraining trade by *acquiring the assets or stock* of competitors or of corporations using the defendants' products. In the *Paramount* case, as in the *Columbia Steel* case (334 U. S. at pp. 522-3), this Court reaffirmed the principle of *per se* illegality and applied it to the *contractual* arrangements of the defendants, stating 334 U. S. at p. 143, "We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se.*" The *Appalachian Coals* case, 288 U. S. 344, did not involve any contractual restraints upon production and it is not an authority for the proposition that price-fixing is subject to the rule of reason. See *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224 (1940), and the more recent decisions of this Court referred to above. See also the *Aluminum* case, 148 F. 2d, at page 427. None of the other cases referred to in the Petition in this connection involved *contractual* provisions for price-fixing or *contractual* restraints in any way similar to those provided for in the Agreement between Penn Water and Consolidated.

** *U. S.* v. *Real Estate Boards,* 339 U. S. 485, 489 (1950); *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 221-224, 228 and fn. 59 pp. 224-226 (1940); *U. S.* v. *Trenton Potteries Co.,* 273 U. S. 392 (1927); *U. S.* v. *Masonite Corp.,* 316 U. S. 265, 276 (1942); *U. S.* v. *Reading Co.,* 226 U. S. 324, 326, 358 (1912); *U S.* v. *Aluminum Co.,* 148 F. 2d 416 (Special Statutory Court 1945); *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490 (1949); *Sugar Institute* v. *U. S.,* 297 U. S. 553, 599 (1936); *Eastern States Lumber Association* v. *U. S.,* 234 U. S. 600, 613 (1914); *Thomsen* v. *Cayser,* 243 U. S. 66, 85 (1917); *American Medical Ass'n* v. *U. S.,* 130 F. 2d 233, 248-249 (D. C. Cir., 1942), aff'd 317 U. S. 519 (1943); *U. S.* v. *National Lead Co.,* 63 F. Supp. 513, 525 (S. D. N. Y., 1945), aff'd 332 U. S. 319 (1947).

Although Consolidated conceded in the Courts below that it and Penn Water, as regulated utilities, were not exempt from the antitrust laws, nevertheless in its Petition Consolidated refers to such regulation, as if that fact affected the application of the antitrust laws to the Agreement between it and Penn Water. The Court of Appeals properly disposed of this contention, citing the decisions of this Court (Vol. III, pp. 85-87).*

Consolidated contends that under the Agreement it bought all of the power produced by Penn Water and that somehow this makes the rule of reason applicable to the Agreement rather than the rule of illegality *per se* as found in the decisions of this Court. But obviously the purchase of a commodity or a service, such as electric energy, under a contract, is not the purchase of the business and assets of a company, and *contractual restraints* upon prices, output, expansion, customers and purchases in an agreement for the sale of electricity are subject to the principle of *per se* illegality laid down in the decisions of this Court and not to the rule of reason test laid down in the decisions of this Court relating only to acquisition of business and assets.**

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* *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945); *U. S.* v. *Borden Co.*, 308 U. S. 188 (1939); *U. S.* v. *Terminal R. Ass'n*, 224 U. S. 383 (1912); *U. S.* v. *Reading Co*, 253 U. S. 26 (1920); *U. S.* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 559-561 (1944). See also *U. S.* v. *Union Pac. R. Co.*, 226 U. S. 61 (1912); *U. S.* v. *So. Pac. Co.*, 259 U. S. 214 (1922).

** In any event, Consolidated did not, under the Agreement, purchase all of the electric energy of Penn Water, nor is it the sole customer of Penn Water. At the time the Agreement was entered into, Penn Water was selling 40% of its energy to others under agreements which have been extended or renewed so that at the present time more than 50% of its energy is sold to others. (Vol. III, p. 80; Vol. I, p. 17).

Furthermore, the taking by Consolidated under the Agreement of the residue of Penn Water's electric energy, and the payment

Finally, in connection with the antitrust laws, Consolidated says that there are other producers of electric energy in the general region and that, therefore, Consolidated, through its control over Penn Water, could not completely monopolize the production and sale of electric energy in the region. Apparently the contention of Consolidated is now, as it was in the Court of Appeals, that, short of absolute monopoly, the antitrust laws do not apply. But the law is perfectly clear that it is not necessary to have a monopoly for the antitrust laws to apply. *U. S.* v. *Paramount Pictures,* 334 U. S. 131, 173 (1948).

Under the Sherman Act it need only be shown that there are contractual restraints of the type present in the Agreement to establish illegality, as the cases cited above show. Under Section 3 of the Clayton Act it is necessary only to show that an appreciable segment of commerce is affected. *Standard Oil Company of California* v. *United States,* 337 U. S. 293, 298-9 (1949). Since Penn Water is one out of only seven producing and wholesaling electric utilities in the region, clearly an appreciable segment of commerce in electric energy is affected.

Similarly, Consolidated says that through its control under the Agreement over Penn Water it could not affect

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therefor of all operating expenses and a fixed return regardless of energy received, was an illegal arrangement under the antitrust laws as removing all incentive on the part of Penn Water to seek business and operate efficiently. *U. S.* v. *Paramount Pictures,* 334 U. S. 131, 149-150 (1948); *Northern Securities Co.* v. *U. S.,* 193 U. S. 197, 327, 328 (1904); *U. S.* v. *Reading Co.,* 253 U. S. 26, 48 (1920); *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.,* 159 F. 2d 306, 309-310 (4th Cir. 1947); cert. den. 331 U. S. 827 (1947); *Lee Line Steamers, Inc.* v. *Memphis, H. & R. Packet Co.,* 277 Fed. 5, 8 (6th Cir. 1922); *Chicago, M. & St. P. R. Co.* v. *Wabash, St. L. & P. R. Co.,* 61 Fed. 993, 997 (8th Cir. 1894).

Since the payment provision is itself illegal, it cannot possibly justify illegal restrictions. Controls otherwise illegal cannot be justified even by a valid consideration, much less by payment provisions which are themselves illegal.

the market price of electric energy. Obviously there is no basis for this statement. The direct primary effect of the control over Penn Water's sales contracts is to fix the market price of such energy. In any event the purpose of the antitrust laws is not solely to protect the public on the matter of prices, but also to ensure plentiful supply and the other advantages of free competition as this Court has repeatedly held.*

Clearly the decision of the Court of Appeals as to the invalidity of the Agreement under the antitrust laws rests firmly on the established doctrines of this Court.

II. The decisions of this Court establish that the Federal Power Act does not deprive the courts of jurisdiction to determine the invalidity of the Agreement under the antitrust laws.**

The Court of Appeals carefully and fully analyzed the contention of Consolidated that the Federal Power Act deprived the courts of jurisdiction to determine the invalidity of the Agreement under the antitrust laws (Vol. III, pp. 88-94). That Court followed the clear holdings of this Court that regulatory commissions do not have power to enforce or to grant absolution from the antitrust laws except where such power is expressly conferred in the statute.

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* *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 501 (1940); *American Tobacco Co.* v. *United States*, 328 U. S. 781, 813 (1946), endorsing the statement of the Special Statutory Court in *United States* v. *Aluminum Company*, 148 F. 2d 416 (1945), at p. 427; *Fashion Guild* v. *F. T. C.*, 312 U. S. 457, 467 (1941).

** As to this issue raised by Consolidated, the Court of Appeals said (Vol. III, p. 88):

> "On this appeal Consolidated presents for the first time in this case the contention that the District Court was without jurisdiction to decide whether the basic agreement violates the Sherman Act because exclusive primary jurisdiction to determine that question has been conferred upon

As the Court of Appeals pointed out, the Federal Power Act contains no such provision.*

The Court of Appeals correctly held that *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), relied upon by Consolidated, has no application here since it involved the Shipping Act of 1916 which, in section 15 (46 U. S. C. §814), expressly empowered the Shipping Board to exempt agreements from the antitrust laws. The Court of Appeals properly held the present case to be controlled by the decisions of this Court in *U. S. Alkali Export Assn.* v. *U. S.*, 325 U. S. 196 (1945) [under §5 of the Webb-Pomerene Act (15 U. S. C. §65)] and *U. S.* v. *Borden Co.*, 308 U. S. 188, 205-6 (1939) [under §2 of the Capper-Volstead Act (7 U. S. C. §292)].**

The Petitioner seeks (Pet., p. 26) to distinguish the *U. S. Alkali* case, *supra*, on the ground that it "involved an admin-

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the Federal Power Commission by the Federal Power Act, 16 U. S. C. A. §§791 to 825. That question was submitted to the District Court not only by the complaint of Penn Water but also by the answer of Consolidated, and the court took jurisdiction of the issue with the express approval of both parties. Nevertheless Consolidated now contends that exclusive primary jurisdiction to consider the question was lodged in the Federal Power Commission by the statute."

This should bar Consolidated from making the contention (*United Railways* v. *West*, 280 U. S. 234, 248 (1930); *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 38-39 (1913)), particularly since the question is solely one of statutory interpretation and does not involve the constitutional grant of judicial power (*Porter* v. *Ohio Fuel Gas Co.*, 158 F. 2d 814, 817 (6th Cir. 1947)).

* The following acts do contain such provision: The Shipping Act (46 U. S. C. §814); the Reed-Bulwinkle Act of 1948 (49 U. S. C. §5(b)(9)); the Transportation Act of 1920, as amended (49 U. S. C. §5(11); the Agricultural Adjustment Act of 1933, as amended (7 U. S. C. §608b); the Willis-Graham Act of 1921, now §221(a) of the Communications Act of 1934 (47 U. S. C. §221(a)).

** To the same effect are *Hinton* v. *Columbia River Packers Association*, 34 F. Supp. 970 (D. C. Ore., 1939), 131 F. 2d 88 (9th Cir. 1942) and *Manaka* v. *Monterey Sardine Industries*, 41 F. Supp. 531 (N. D. Cal., 1941), both of which arose under the Fishermen's Cooperative Marketing Act (15 U. S. C. §§521-522).

istrative agency with investigative powers only". The fact is that the administrative agency there involved had more extensive powers than are given to the Federal Power Commission by the Federal Power Act. The administrative agency under the Webb-Pomerene Act had specific power to conduct investigations as to violations of the antitrust laws and, if it found violations, to make recommendations to the Attorney General for action thereon. The Federal Power Commission is given by the Federal Power Act (16 U. S. C. §820) only the function (which is also given to the Secretary of War) to request the Attorney General to institute court proceedings (which he may or may not institute) to revoke a license issued under the Federal Power Act if the Commission believes that a condition of the license has been violated, one of the required conditions being that a licensee shall not enter into agreements or arrangements restraining trade (16 U. S. C. §803(h)).* It should be noted that, if the Attorney-General takes action to enforce this condition of a license, jurisdiction to make the determination is in the courts not the Commission.

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* This section of the Federal Power Act, known as Section 10(h), reads as follows:

> "Sec. 10. All licenses issued under this Part shall be on the following conditions: * * *
>
> (h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or services are hereby prohibited."

The section merely contains the text of one of the conditions to which all licenses issued to electric utilities under the Act are required to be made subject. Contrary to the implication contained in the footnote on page 4 of the Petition, the section is not itself an operative provision of the Act and the Federal Power Commission has no jurisdiction to take action thereunder and the Court of Appeals so held (Vol. III, pp. 88, 91).

Petitioner also tries (Pet., p. 26) to distinguish both the *Alkali* and *Borden* cases by the claim that they dealt with additional parties and subject matter not in the control of the administrative agencies involved. There is nothing to the contention. In those cases this Court clearly held that the parties and subject matter (including application of the antitrust laws) which were claimed to be committed solely to the control of the administrative agencies and therefore not to be under the jurisdiction of the courts, were nevertheless under the jurisdiction of the courts with respect to violation of the antitrust laws.*

The Court of Appeals adequately disposed of the other cases principally relied on by Petitioner by pointing out (Vol. III, p. 93) that this Court had held (*U. S. Alkali Export Ass'n* v. *U. S.*, 325 U. S. 196, 210 (1945)) the rule laid down in *Myers* v. *Bethlehem Corp.*, 303 U. S. 41 (1938) regarding exhaustion of administrative remedies to be inapplicable to issues under the antitrust laws in face of a federal statute of the type here involved.**

In addition to claiming that the Federal Power Commission has jurisdiction to determine whether the Agree-

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* The Petition also states (p. 28) that the case of *Georgia* v. *Pennsylvania Railroad Co., et al.*, 324 U. S. 439 (1945), is distinguishable because the jurisdiction of the Federal Power Commission under the Federal Power Act is more extensive than that of the Interstate Commerce Commission under the Interstate Commerce Act with regard to restraints of trade. This is simply incorrect. The Interstate Commerce Act gives the Interstate Commerce Commission express power to exempt many transactions from the application of the antitrust laws (49 U. S. C. §5(11)) whereas the Federal Power Commission has no such power at all.

** The other cases like the *Myers* case relied on by Petitioner (Pet., p. 26), and similarly distinguishable, are: *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540 (1946); *F. P. C.* v. *Arkansas Power & Light Co.*, 330 U. S. 802 (1947); *S. E. C.* v. *Otis & Co.*, 338 U. S. 843 (1949); *Endicott-Johnson Corp.* v. *Perkins*, 317 U. S.

ment is invalid under the antitrust laws, Consolidated reiterates the claim it made for the first time on appeal in the Court of Appeals that the Commission exercised such jurisdiction and determined the Agreement to be valid.

Consolidated claims that in determining that Penn Water was required to take out a license under the Federal Power Act in respect of its hydroelectric plant on the Susquehanna River, the Commission passed on the Agreement. This untenable claim is completely disposed of by the Court of Appeals (Vol. III, pp. 94-95).

Consolidated also bases its contention on a proceeding instituted by the Federal Power Commission to investigate the rates of Penn Water. Again the Court of Appeals has entirely disposed of this claim (Vol. III, pp. 95-97).

As the Court of Appeals pointed out, the question of the validity of the Agreement was not involved in any of the proceedings above mentioned, and the Federal Power Commission in the second proceeding adverted to the fact that this question was in the courts and disclaimed any intention of passing on it.*

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501 (1943); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946).

Northwestern Public Service Co. v. *Montana-Dakota Utilities Co.*, 181 F. (2d) 19 (8th Cir. 1950), also relied on by Petitioner, merely applied the rule of *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907) which the Court of Appeals distinguished and held to be inapplicable (Vol. III, p. 93). These cases did not involve suits under the antitrust laws but only attacks on rates or services as excessive or discriminatory. The other case relied on by Petitioner, *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 603 (1926), is clearly not in point. It simply holds that enforcement of the Federal Trade Commission Act is within the exclusive jurisdiction of the Federal Trade Commission.

* In fact Consolidated stated in its brief in the District Court (Vol. III, p. 3): "We do not say that the question of violation of Section 10(h) [of the Federal Power Act (16 U. S. C. 803(h))] was put to and decided by the Commission as a specific issue in the rate proceeding", and the District Court so found (Vol. I, p. 29).

The gradual extension of these contentions of Consolidated in this connection brings out their lack of foundation. In the Court of Appeals Penn Water pointed out the inconsistency of Consolidated in claiming that Penn Water (by calling this suit to the attention of the Commission in its petition for rehearing) had submitted to the Federal Power Commission the issue of the invalidity of the Agreement under the antitrust laws when Consolidated did not claim that Penn Water had also thereby submitted to the Commission the issue of the invalidity of the Agreement for contravention of public policy and the Pennsylvania statutes, for *ultra vires,* and the issue of nonexistence of the Agreement by reason of rescission because of material breach by Consolidated, all issues in this suit. Apparently in an attempt to remedy such inconsistency, Consolidated now for the first time claims that the Federal Power Commission has jurisdiction to determine the invalidity of the Agreement on all grounds, and that the Commission has done so (Pet., p. 4, Ques. (3), and pp. 19, 20, 25). It is, of course, absurd to contend that the Federal Power Commission has jurisdiction to pass on such questions, e. g., *ultra vires,* or has done so.

III. The decisions of this Court establish that the Agreement is invalid because thereby Penn Water surrendered managerial and charter powers and disabled itself from performing its proper functions as a public utility corporation.

The Court of Appeals held (Vol. III, pp. 97-100) that by the Agreement Penn Water had surrendered its managerial and charter powers on vital phases of its business and affairs to Consolidated and thereby disabled itself from performing its proper functions as a public utility corporation, that is, its duty to initiate and propose rates

and prices and improvements, and to extend its services. The Court of Appeals held that such surrender and disablement thus effected by the Agreement were illegal and the Agreement therefore was invalid. The basic holding of illegality was founded on the general doctrine of public policy applicable to public utility corporations as laid down in a long line of decisions of this Court and other courts headed by the decision of this Court in *Gibbs* v. *Consolidated Gas Company of Baltimore,* 130 U. S. 396 (1889),* "irrespective of statutory prohibition" in the state of incorporation (Vol. III, pp. 98-100). The Court further held that the statutes** of Penn Water's state of incorporation, Pennsylvania, were coextensive with this general public policy and prohibited such a surrender and disablement of powers as that resulting from the Agreement.

Thus, there is no conflicting doctrine between the laws of any jurisdiction involved, regarding the requirement that a public utility corporation retain its power over the internal management of its business and affairs and not disable itself from performing its proper functions. Consequently, there is in this case no question of regulation of

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* Other cases to the same effect are: *Thomas* v. *Railroad Co.,* 101 U. S. 71, 83 (1879); *Central Transp. Co.* v. *Pullman's Car Co.,* 139 U. S. 24, 48-51 (1891); *Arizona Grocery Co.* v. *A. T. & S. F. R. Co.,* 284 U. S. 370, 384 (1932); *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 458-460 (1945); *U. S. Tel. Co.* v. *Central Union Tel. Co.,* 202 Fed. 66, 72-73 (6th Cir. 1913); *Magaha* v. *City of Hagerstown,* 95 Md. 62, 72, 51 A. 832, 835 (1902).

** The Public Service Company Law, approved July 26, 1913, Pamphlet Laws 1374 (Effective January 1, 1914) as amended and supplemented.

Article II—Duties and Liabilities of Public Service Companies

"Section 1. It shall be the duty of every public service company—

"(a) To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and

rates and services in interstate commerce. *A fortiori,* there can be no question of conflict between state statute or public policy and federal statute or public policy in respect of such regulation. In this branch of the case we are not in the field of law relating to regulation of rates or services or operations, but in the field of law relating to the inherent authority of public utility corporations, in which field the decisions are unanimous (Consolidated has pointed to no contrary decision) that such corporations lack the power and authority to divest themselves of their managerial and charter powers over vital phases of their business by surrendering them to another.

Therefore, the reference to the commerce clause of the Constitution and to the *Attleboro* case, 273 U. S. 83 (1927), made for the first time by Consolidated in its Petition, is irrelevant; and other cases cited in its Petition (pp.

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practically sufficient for the accommodation and safety of its patrons, employes, and the public, and in conformity with such reasonable regulations or orders, as may be made by the commission.

"(b) To render and furnish all such service at prices, charges, rates, tolls, fares or compensation that shall be just and reasonable, and in conformity with such reasonable regulations or orders as may be made by the commission.

"(c) To make all such repairs, changes, alterations, and improvements in or to such service, including facilities, as shall be reasonably necessary for the accommodation or safety of its patrons, employes and the public. * * *"

Article III—Creation, Powers and Limitations of Powers, of Public Service Companies.

"Section 3. Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful—

* * * * * *

"(c) For any public service company to sell, assign, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person."

30-31, par. 12 and first paragraph of par. 13), relating to states putting obstacles in the way of the flow of interstate commerce are also beside the point.

Regardless of questions of interpretation of the Pennsylvania statutes and of estoppel of the Pennsylvania Commission, in the language of the Court of Appeals (Vol. III, p. 98) "such restrictions upon the freedom of a public utility cannot be sustained, irrespective of statutory prohibition", citing the *Gibbs* case and the other cases referred to above.*

Clearly, on this question of illegal surrender of powers which disabled Penn Water from performing its proper functions as a public utility corporation, the decision of the Court of Appeals was in conformity with the established decisions of this Court.

Conclusion.

Since the decision of the Court of Appeals follows the decisions of this Court on all the real issues presented, the Petitioner has shown no sound ground for a review of this case by this Court. It should also be pointed out that if the Court of Appeals correctly followed the decisions of this Court as to either (a) the invalidity of the Agreement, under the antitrust laws (Point I above) and the jurisdiction of the courts to adjudicate such invalidity (Point II above), or (b) the invalidity of the Agreement by reason of the surrender thereunder by Penn Water of its managerial

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* Consolidated makes one further claim in this connection, that the Agreement is legal because it is expressed to be subject to the performance by Penn Water of duties imposed upon it by its charter or otherwise by law. The insertion of such clauses does not save an otherwise illegal agreement. *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 507 (1898).

and charter powers thereby disabling it from performing its proper functions as a public utility corporation (Point III above), the decision of the Court of Appeals must stand. Petitioner, to be entitled to a writ of certiorari, would have to show that the Court of Appeals deviated from the decisions of this Court on both branches of the case.

The petition for certiorari should be denied.

Respectfully submitted,

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December, 1950.

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DEC 4 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950

No. 418

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,

Petitioner,

vs.

PENNSYLVANIA WATER & POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF RESPONDENT PENNSYLVANIA PUBLIC UTILITY COMMISSION IN OPPOSITION

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I

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It will be found on pages 75-102 of Vol. III of the Record. The opinion of the District Court (Vol. 1, p. 1)* is reported in 89 F. Supp. 452.

* All such reference herein are to volumes of the Appendices forming part of the record.

II

JURISDICTION

The Petitioner has invoked the jurisdiction of this Court under U.S.C. Title 28, Sec. 1254.

III

COUNTER-STATEMENT OF THE CASE

A complete and correct factual statement of the instant litigation is contained in the Opinion of the Court of Appeals (Vol. III pp. 75-82).

As appears in the above mentioned statement of the facts, Pennsylvania Water & Power Company (hereinafter "Penn Water") is a Pennsylvania electric utility corporation with all of its electric generating property located at Holtwood, Pennsylvania (Vol. III pp. 76-77). Consolidated Gas Electric Light and Power Company of Baltimore (hereinafter "Consolidated" or "Petitioner") is a Maryland electric utility corporation. Penn Water sells parts of its electric energy under separate contracts to three wholesale customers in Pennsylvania, namely, Metropolitan Edison Company, Philadelphia Electric Company, and Pennsylvania Power & Light Company and to one retail consumer, the Pennsylvania Railroad Company, a substantial portion of the energy to the Pennsylvania Railroad being delivered in Pennsylvania. All of its remaining energy is sold at wholesale to the Petitioner under the terms of a basic agreement (Vol. III pp. 77-78). This basic agreement be-

tween Penn Water and Petitioner was entered into on June 1, 1931, and it is the validity of this agreement which constitutes the subject of this litigation.

The basic agreement was never submitted to the Pennsylvania Commission for approval (Vol. III p. 81).

The provisions of the basic agreement which gave rise to the contentions of invalidity are contained in Articles IV and V (Volume III pp. 80-81) which are as follows:

> "Article IV. So far as possible consistently with the performance of any duty or obligation to serve imposed on Power by its charter or otherwise by law, Power shall obtain the approval of Electric be- [fol. 84] fore entering into any agreement or agreements with any other person or corporation for the sale and/or purchase and/or interchange of electrical and hydraulic power and energy, or before making any substantial modifications in the existing contracts now in force between Power and its customers other than Electric.
>
> Article V. So far as possible consistently with the performance of any duty or obligation aforesaid, Power shall obtain the approval of Electric (1) before incurring any single commitment for investment (except

for renewals or replacements) in excess of $50,000.00 on the basis of which Electric shall make payment under Article III(b) hereof, and (2) before alienating or disposing of in any one year any property, plant, or equipment, other than stores and construction equipment having a total value in excess of $50,000.00 and included in the investments of Power and/or subsidiaries of Power in plant, property or power developments devoted to the generation, transmission, or distribution of electrical power and energy."

As both the District Court and the Circuit Court of Appeals found and it is not disputed, these provisions of the agreement confer upon Petitioner the power to control (1) the prices at which Penn Water may sell its energy; (2) the extent to which Penn Water may expand its plant; (3) the territory in which Penn Water may make sales and (4) the amount of back feed energy which Power may purchase from Petitioner (Volume III p. 82).

Petitioner has recently attempted to exercise the above controls when in 1948 it refused to permit Penn Water to expand its plant (Volume III p. 82).

The Pennsylvania Commission has throughout these proceedings taken the position that the basic agreement is invalid (1) because it did not

have the prior approval of the Pennsylvania Commission as required by Article III, Section 3(c) of the Public Service Company Law (1913 P. L. 1374); (2) that the disablement effected by the contract whereby the control of Penn Water's rates and the manner and extent of its service were surrendered to Consolidated was contrary to the public policy and statutes of Pennsylvania.

Pennsylvania Commission will limit the scope of this brief in opposition to the points raised by Petitioner under Sections (3) and (4) on page 24 of the Petition for Writ of Certiorari and to the argument on those points contained in paragraphs 12 and 13 found on pages 30 to 33 inclusive of the Petition. The statutes involved are Section 1 of Article II* and Section 3 of Article III* of the Pennsylvania Public Service

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* The Public Service Company Law, approved July 26, 1913, Pamphlet Laws 1374 (Effective January 1, 1914) as amended and supplemented.

Article II—Duties and Liabilities of Public Service Companies.

"Section 1. It shall be the duty of every public service company—

"(a) To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employes, and the public, and in conformity with such reasonable regulations or orders, as may be made by the commission.

Company Law which was in effect at the time the basic agreement was entered into and which remained in effect until June 1, 1937, and comparable sections of the Pennsylvania Public Utility Law (1937 P. L. 1053, 66 Purdons Statutes Sec. 1101 et seq.) which superseded the Public Service Company Law and which has been in effect from June 1, 1937, to date.

There is no issue in this case involving the determination of the respective jurisdictions of the Pennsylvania Commission and the Federal Power Commission over the operations of Penn

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"(b) To render and furnish all such service at prices, charges, rates, tolls, fares or compensation that shall be just and reasonable, and in conformity with such reasonable regulations or orders as may be made by the commission.

"(c) To make all such repairs, changes, alterations, and improvements in or to such service, including facilities, as shall be reasonably necessary for the accommodation or safety of its patrons, employes and the public. * * *"

Article III—Creation, Powers and Limitation of Powers of Public Service Companies.

"Section 3. Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful—

* * * * * * *

"(c) For any public service company to sell, assign, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person."

Water. Petitioner apparently seeks to becloud the real issues in this case by attempting to impose such an issue (Paragraph 12 p. 30 of the Petition.) This question is now before the United States Court of Appeals for the District of Columbia Circuit.* However it is clear that the instant case involves no issue between federal and state rights. If future circumstances should require this question to be reviewed by this court it should be in those cases and not this one.

A subsidiary point not determinative of the real issue in this proceeding is the question as to whether or not the Pennsylvania Commission is estopped from raising the questions as to the validity of the basic contract. However, it is not contended by anyone that Penn Water was estopped and it has raised the same questions so that they are clearly before the Court.

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* Case No. 10,236, **Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland, Petitioners,**

v.

Federal Power Commission, Respondent.

Case No. 10,239, **Pennsylvania Public Utility Commission, Petitioner,**

v.

Federal Power Commission, Respondent.

Case No. 10,531, **Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland, Petitioners,**

v.

Federal Power Commission, Respondent.

Both Consolidated and the Public Service Commission of Maryland have intervened in those cases, which have been consolidated for the purpose of argument.

IV

ARGUMENT

Response to Paragraph 12 of Petition

There is no conflict of federal and state jurisdiction involved in this case. Petitioner for the first time in these proceedings cites **Public Utilities Commission v. Attleboro Steam and Electric Co.**, 273 U. S. 83 (1927) in an attempt to show that the Pennsylvania Commission is interfering with interstate commerce and claiming jurisdiction which it does not possess. Petitioner is apparently making the claim that the Federal Power Commission has regulatory authority over all of Penn Water's operations, including rates and service, and that the Pennsylvania Commission consequently has no standing to contest the validity of the contract. Yet the Federal Power Commission itself did not take jurisdiction over the retail sales to the Pennsylvania Railroad Company. **In the matter of Pennsylvania Water & Power Company,** F.P.C. Docket No. IT-5915, Opinion 173, dated January 4, 1949, rehearing denied February 28, 1949, Opinion 173-A (Referred to by Petitioner in footnote 3, page 3 of its petition). The ob-

vious reason for not taking jurisdiction is that direct sales to an industrial customer, whether such sales are interstate or intrastate, are subject to the jurisdiction of the state where the sale is made. **Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, et al.,** 332 U. S. 507 (1947).

The sales to Metropolitan Edison Company, Pennsylvania Power and Light Company and Philadelphia Electric Company (the Pennsylvania customers), are wholesale sales and there is a conflict of jurisdiction between the Pennsylvania Commission and the Federal Power Commission over these sales. This matter is not involved in this proceeding. However the Pennsylvania Commission has appealed from the Federal Power Commission's jurisdictional findings in regard to these sales and the appeal is now pending before the Court of Appeals for the District of Columbia Circuit (No. 10,239), and any conflict between state and federal jurisdiction should be resolved in that proceeding.

In any event the Pennsylvania Commission has some jurisdiction over the rates and service of Penn Water. There is no conflict of federal and state jurisdiction involved in this case, and Pennsylvania is in the case only because its laws relating to the inherent duties of Pennsylvania utilities have been and are being violated by the contract in question.

Response to Paragraph 13 of Petition

Petitioner states again that Pennsylvania public policy cannot affect interstate sales at wholesale, or in other words cannot concern a company which is not subject to Pennsylvania's jurisdiction. The answer to this erroneous concept of jurisdiction is contained in the previous section of this brief. Petitioner also claims that the Court of Appeals improperly interpreted the public policy of Pennsylvania. That is not true. The policy that a public utility must remain free and unhampered to initiate reasonable rates and adequate service is contained not only in such cases as **Gibbs v. Baltimore Gas Co.**, 130 U. S. 396; **Central Transportation Co. v. Pullman's Car Co.**, 139 U. S. 24, 48, 51; and **U. S. Tel. Co. v. Central Union Tel. Co.**, 6 Cir., 202 Fed. 66, 72 73, but is also contained in the present Pennsylvania Public Utility Law, Approved May 28, 1937, Pamphlet Laws 1053, 66 Purdon's Pennsylvania Statutes Ann. §1101 et seq. The applicable sections are set forth in a footnote.*

* Section 301. Rates To Be Just and Reasonable. —Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commis-

The utility must furnish adequate service at reasonable rates, and it cannot abnegate its duties in this respect by agreeing to secure the prior approval of another corporation before fulfilling these duties.

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sion; Provided, That only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same force, and in like manner, as if such service were rendered by a public utility.

Section 401. Character of Service and Facilities. —Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employes and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions with the same force and in like manner as if such service were rendered by a public utility.

Response to Paragraph 13(a) of Petition

Without the controls exercised by Consolidated over Penn Water (which Consolidated calls "ancillary restraints"), Penn Water could have expanded its plant when necessary and could have made changes in its contracts to render service, both as to the amount furnished and the rates charged. Under the basic agreement it cannot do so without Consolidated's approval. The Pennsylvania Commission is not permitted by law to manage a utility. The law and the regulations thereunder prescribe broadly what a utility must do, but the power of initiation remains with the utility. (Vol. III p. 99). The basic agreement transfers that power to Consolidated. The mere recital of the controls now exercised by Consolidated shows that Penn Water has given up many of its "powers, franchises, or privileges." It did so without the approval of the Pennsylvania Public Service Commission, and it is now disabled from performing the duties prescribed by the present Public Utility Law.

The language of the section of the law forbidding transfers of powers, franchises, or privileges is clear and unambiguous. Of course,

Petitioner is unable to cite any cases containing a holding contrary to the interpretation made by the Court of Appeals for the Fourth Circuit, because there are none.

Response to Paragraph 13(b) of Petition

Petitioner's claim of estoppel against the Pennsylvania Commission is pointless, since Penn Water has advanced the same reasons as the Pennsylvania Commission to prove invalidity, and there is no claim that Penn Water is estopped.

In addition Petitioner's statement that the basic agreement has been on file with the Pennsylvania Commission for over sixteen years is misleading. As is shown in Defendant's Exhibit No. 4, the filing was only as a tariff, and an informational tariff at that, because the rates charged Consolidated for energy are interstate charges which the Pennsylvania Commission has not attempted to regulate. The basic elements of estoppel are lacking, and the cases cited are not in point. We will not burden the Court with a recital of the distinguishing features. The Court of Appeals obviously did not consider worthy of discussion the proposition that a regulatory commission can be estopped from the proper performance of its duties.

Response to Paragraph 13 (c) of Petition

We have shown in our response to paragraph 13 that the Court of Appeals properly interpreted the public policy of Pennsylvania. The case cited by Petitioner, **York Haven W. & P. Co. v. Public Service Commission,** 287 Pa. 241, 245 (1926), says nothing more than that merger or consolidation of corporations may under certain circumstances be beneficial. We have no quarrel with that view, but it is not relevant to this case. The public policy here at issue is whether or not a Pennsylvania public utility can by contract transfer its powers, franchises, or privileges to a foreign corporation so that it is disabled from performing its legal duties. The decisions of this court and the Pennsylvania Public Utility Law have expressed a public policy that requires a utility to be free to act.

Nor does the basic agreement gain validity because it is expressed to be subject to the performance by Penn Water of duties imposed upon it by its charter or otherwise by law. Under Petitioner's present interpretation, Articles IV and V of the agreement would be completely meaningless for the law requires the utility to make the initial determination of the amount of

power it shall sell to its customers, the terms and rates under which it shall be sold, and the expansion of plant necessary to furnish adequate service. Articles IV and V constitute a surrender of those powers. It is ridiculous to say that the Pennsylvania Commission can or should, by order, compel Penn Water to do its own thinking, which is in effect what Petitioner is claiming can be done under the agreement.

Conclusion

There is no conflict between state and federal law or state and federal jurisdiction in this case. The decision of the Court of Appeals was that the basic agreement is invalid because, inter alia, (1) it was never approved by the Pennsylvania Commission and (2) it disables Penn Water from performing its legal duties required by public policy and the statutes of Pennsylvania. The decision of the Court of Appeals conforms with decided law, both federal and state.

The petition for a writ of certiorari should be denied.

Respectfully submitted,
LLOYD S. BENJAMIN,
THOMAS M. KERRIGAN,
CHARLES E. THOMAS,
Counsel for Respondent, Pennsylvania Public Utility Commission.

December 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 418

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,

Petitioner,

vs.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

The purpose of this Reply Brief is to call this Court's attention to recent representations made by Penn Water and the Pennsylvania Public Utility Commission to the United States Court of Appeals for the District of Columbia, which point up the imperative need for review by this Court of the case at bar, to resolve an important jurisdictional conflict.

On November 22, 1950—two days before our petition for certiorari was filed—Penn Water filed a motion in the proceedings now pending before the United States Court of Appeals for the District of Columbia to review the Federal Power Commission's rate order dated January 5, 1949, and passed *In the Matter of Pennsylvania Water and Power*

Company, FPC Docket No. IT-5915, which motion contains important representations by Penn Water. This motion seeks a postponement of the rate order review proceedings for a reasonable time "after action by the Supreme Court of the United States on the decision of the United States Court of Appeals for the Fourth Circuit" in the case at bar.

In this motion, Penn Water makes repeated representations,* quoted below, to the Court of Appeals for the District of Columbia, which establish Penn Water's position that, by obtaining a favorable decision from the Court of Appeals for the Fourth Circuit striking down the Basic Agreement, it has cut the ground from under the Federal Power Commission's jurisdiction over Penn Water's rates and charges, which jurisdiction was effectively asserted by the Commission in a proceeding which took years to try, and covered 21,000 pages of testimony and hundreds of exhibits. These characterizations by Penn Water of the effect of the decision of the Court of Appeals for the Fourth Circuti emphasize the clear cut conflict between the Federal Power Commission's own decision in the rate case, as asserted by Penn Water and the Pennsylvania Public Utility Commission, and the decision of the Court of Appeals for the Fourth Circuit in the present case, as to the jurisdiction of the Federal Power Commission. They emphasize the imperative need for a decision by this Court resolving that conflict. The question of the primary jurisdiction of the Federal Power Commission over Penn Water's tariff, which is the Basic Agreement, should be determined by this Court.

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* In its Brief in Opposition, pp. 6 and 7, Penn Water argues that the District Court's finding in the case at bar, that the motive and purpose of Penn Water's collateral attack upon the Basic Agreement was to escape the jurisdiction of the Federal Power Commission over its rates and charges, was unsupported, and Penn Water, in this brief, attempts to disavow that motive and purpose. The representations which Penn Water makes in the motion are completely inconsistent with this attempt.

On November 30 1950, respondent Pennsylvania Public Utility Commission, in a similar Motion to Postpone the rate review proceedings in the Court of Appeals for the District of Columbia, makes similar representations, quoted below.

If the abrogation of the Basic Agreement by the Court of Appeals for the Fourth Circuit has the jurisdictional effect now ascribed to it by Penn Water and the Pennsylvania Commission, then a situation is presented in which a Federal administrative tribunal, with all parties to the case at bar before it, and with quasi-judicial powers to determine its own jurisdiction in the first instance, subject to direct statutory court review,* has determined that it has jurisdiction, and a Court of Appeals, *not in direct review proceedings but in collateral proceedings,* has determined that it has not. Which shall govern?

Penn Water's Representations

The representations of Penn Water contained in its said motion to which we allude, are as follows:

> "In arriving at the conclusions set forth as the basis of the orders herein sought to be reviewed, the Commission examined Petitioners' operations upon the premise that a certain long term contract between Penn Water and Baltimore Company (the Baltimore contract) was valid and would continue to be in full force and effect through April 22, 1980. The rights, obligations and responsibilities created by the Baltimore contract, and the continuance of Penn Water's operations in accordance therewith, *is inherent in and essential to the Commission's conclusions that (a) it had jurisdiction to regulate all of Penn Water's rates and charges,* * * * " (p. 3)
>
> "Petitioners submit that if the Supreme Court of the United States should deny the application for the

* See: *F. P. C. v. Arkansas Power & Light Co.,* 330 U. S. 802 (1947); *S. E. C. v. Otis & Co.,* 338 U. S. 843 (1949); *Endicott-Johnson Corp. v. Perkins,* 317 U. S. 501 (1943); *Oklahoma Press Publishing Co. v. Walling,* 327 U. S. 186 (1945).

aforesaid writ of certiorari, or if such writ should be granted and the aforesaid decision of the United States Court of Appeals for the Fourth Circuit be affirmed, *the considerations upon which the Commission's orders herein sought to be reviewed were based, would be legally and factually untenable and the issues in these proceedings would, in consequence, become moot.*" (p. 4)

* * * * * *

"The order of January 5, 1949 and all subsequent orders of the Commission issued in these rate proceedings were entered in accordance with opinions and findings of the Commission which included, among other things, the following conclusions:

> '(i) That the Commission has jurisdiction to regulate all Penn Water's rates and charges, both as a "licensee" under Part I of the Federal Power Act and as a "public utility" under Part II of the Federal Power Act, *because Penn Water's operations and revenues were governed by the Baltimore contract* (Pet. App. 180, 182-184); * * * '". (p. 7)

"If the decision of the United States Court of Appeals for the Fourth Circuit, declaring the Baltimore contract illegal and invalid, become final, *the Commission's determinations as to its own jurisdiction to entertain these proceedings,* * * * *will become wholly nugatory* * * *." (p. 8)

* * * * * *

"Unless the consideration of the instant proceedings by this Court is postponed, the merits of that position will have to be presented to this Court on the basis of the decision of the United States Court of Appeals for the Fourth Circuit while review of that decision is being sought and without benefit of the Supreme Court's action or views thereon.

"If the decision of the United States Court of Appeals for the Fourth Circuit, invalidating the Baltimore contract, becomes final, Petitioners are prepared to urge to this Court that *the proceedings before the Commission, and the orders herein sought to be re-*

viewed, are invalid because they are premised upon the validity and binding force of the obligations set forth in the Batlimore contract and upon the continuance of operations pursuant thereto, * * * " (p. 12)

* * * * * *

"It is evident from the Commission's findings that its asserted jurisdiction to regulate all the rates and charges of Penn Water, both under Part I and Part II of the Federal Power Act, is premised upon operations which the Commission conceives to be required by the Baltimore contract. If the Baltimore contract is invalid the contractual method upon which the Commission *premised its jurisdictional findings is nonexistent."* (p. 14)

* * * * * *

"The *Commission's findings of jurisdiction would be unsupported* if the decision of the United States Court of Appeals for the Fourth Circuit declaring invalid and illegal those contractual arrangements upon which the findings are premised should become final because the Commission's determination would have been based upon a set of conditions invalid and illegal at the time the determination was made and which would continue to be illegal in the future." (p. 16)

* * * * * *

"Whether or not the Commission would have jurisdiction to examine the reasonableness of the rates and charges to be contained in any such rate schedule (a new rate schedule which Penn Water suggests that it might file), *or the extent thereof, if any, is a question which need not now be determined.* The significant factor is that *the tariff that has been prescribed by the Commission,* allegedly in accordance with its rate order, is premised upon the continued existence of the Baltimore contract. If the Baltimore contract is invalid the rate schedule prescribed pursuant thereto is unsupportable." (p. 21) (Italics supplied and material in parenthesis supplied).

Pennsylvania Public Utility Commission's Representations

"4. The contract which the United States Court of Appeals for the Fourt Circuit has declared invalid, prescribes the operations under which the Federal Power Commission took jurisdiction over all the rates and charges of Pennsylvania Water and Power Company, with the exception of direct sales to the Pennsylvania Railroad. If this holding is not disturbed by the Supreme Court of the United States *the basis of Federal Power Commission jurisdiction may well be lost;*

"5. If the contract is finally determined to be invalid and the method of operations by Pennsylvania Water and Power Company is thereby changed, it would become necessary for the Federal Power Com mission to make new jurisdictional findings or to renounce its jurisdiction over all or part of the rates and charges of Pennsylvania Water and Power Company." (Italics supplied)

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1950

No. 424

JOHN H. HESSEY, FRANK HARPER, and OLIN R. HIGGINS, Constituting The PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners

vs.

PENNSYLVANIA WATER AND POWER COMPANY, and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF RESPONDENT, PENNSYLVANIA PUBLIC UTILITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It will be found in Vol. III, pp. 75-102 of the Record.* The opinion of the District Court (Vol. I, p. 1) is reported in 89 F. Supp. 452.

* All such references herein are to volumes of the Appendices forming part of the record filed with this court in the matter of Consolidated Gas Electric Light and Power Company of Baltimore v. Pennsylvania Water and Power Company and Pennsylvania Public Utility Commission, No. 418 October Term, 1950.

JURISDICTION

The Petitioner has invoked the jurisdiction of this Court under U.S.C. Title 28, Sec. 1254.

COUNTER-STATEMENT OF THE CASE

A complete counter-statement of the case appears in our brief in opposition to certiorari in Consolidated Gas Electric Light and Power Company of Baltimore, Petitioners, vs. Pennsylvania Water and Power Company and Pennsylvania Public Utility Commission, Respondents, at No. 418 October Term, 1950.

Supplementing the above mentioned counter-statement, we desire to submit the following additional information.

We first desire to point out that the Public Service Commission of Maryland (Petitioners) in setting forth numerically the grounds upon which the Court of Appeals reversed the District Court, failed to include the very important conclusion of the Court of Appeals that "* * * We hold merely * * * that the contract is invalid since it * * * disables Penn Water from performing its proper function as a public utility under the public utility laws of Pennsylvania; * * *" (Vol. III, p. 101). This holding is completely supported by the Court's reasoning in its opinion (Vol. III, pp. 97-98).

Petitioners assert that the agreement in question provides "* * * for the sale of **all** of Penn

Water's energy to Consolidated at wholesale in interstate commerce, * * *" (Petitioner's Brief, p. 3). This statement, which is apparently the keystone of Petitioner's entire argument, is directly contrary to the summary of the contents of the agreement by the District Court (Vol. I, p. 5) which reads as follows:

> "Article II provides for the purchase by Electric of all of Power's electrical capacity and energy **not otherwise disposed of by Power** in the performance of (1) Power's then existing contracts (namely, those with its Pennsylvania customers); (2) new contracts entered into by Power with Electric's approval; and (3) 'any duty or obligation to serve imposed on Power by its charter or otherwise by law.'" (emphasis added)

It is also directly contrary to the finding of the Court of Appeals (Vol. III, pp. 77-78) which reads as follows:

> "Penn Water **sells its electric energy** and services in bulk **to five customers.** It has a contract with Metropolitan Edison Company, which operates in the central and eastern part of Pennsylvania; a contract under which it supplies electric services to the Philadelphia Electric Company at Coatesville, which serves an area around Chester, Pennsylvania; a contract with Pennsylvania Power and Light Company

for the supply of power in the Lancaster territory extending from the Maryland line north to Harrisburg and eastward to Reading. These three public utility companies are the Pennsylvania customers of Penn Water. In addition Penn Water has a contract with Consolidated to supply power and energy over transmission lines to Baltimore, and also in connection with another contract to the Pennsylvania Railroad. Most of the energy supplied to the Railroad is delivered from Safe Harbor to Perryville, but there is another source of supply to the Railroad in Washington. It will be seen that the greater part of the energy produced by Penn Water is sold at wholesale to four customers, while the remaining portion is sold at retail to the Pennsylvania Railroad as consumer." (emphasis added)

This contention that the agreement provides for the sale of all of Penn Water's energy at wholesale and interstate commerce contradicts the admission of Consolidated itself when it admitted Penn Water's allegation that Penn Water "* * * sells all of its electric services in bulk to five customers * * *" (Vol. II, p. 1-2 par. 5 of Complaint; Vol. II, p. 26, Par. 1 of Answer).

Maryland Commission alleges that the basic agreement "* * * has been considered separately

by all three commissions on several occasions and also by the courts." (Petition p. 8). The truth of the matter, of course, is that no Commission and no Court has ever considered the agreement in the light of the Sherman or Clayton acts, or in the light of the surrender of powers and duties by one public utility to another except in the present litigation.

REASON FOR DENIAL OF MARYLAND COMMISSION'S PETITION FOR WRIT OF CERTIORARI

In response to a petition at No. 418 October Term, 1950 by Consolidated Gas Electric Light and Power Company for writ of certiorari to the United States Court of Appeals for the Fourth Circuit concerning an opinion of that court dated September 30, 1950, the Pennsylvania Public Utility Commission is submitting a brief in opposition thereto.

The Public Service Commission of Maryland (Maryland Commission) has now filed its petition for a writ of certiorari in regard to the same opinion of the Court of Appeals. Since the petition of the Maryland Commission is substantially a reiteration of the position taken by Consolidated in its petition, the Pennsylvania Commisson respectfully requests this Court to consider the arguments in its brief in opposition to Consolidated to be applicable to the instant petition of the Maryland Commission.

The position of the Maryland Commission, insofar as the application of Pennsylvania law and public policy are concerned, is that as a result of the agreement of 1931, herein questioned,

Pennsylvania Water & Power Company sells **all** its power to Consolidated, which, being an interstate sale, precludes the Pennsylvania Commission from any jurisdiction over Penn Water.

The Maryland Commission's novel "one-sale" concept is incorrect. Penn Water is not selling all its energy to Consolidated. It is merely selling to Consolidated whatever is left after its existing contractual customers are supplied, namely, Pennsylvania Power & Light Company, Metropolitan Edison Company, Philadelphia Electric Company, and the Pennsylvania Railroad Company. In other words it is a **residual** type contract; Consolidated is entitled to whatever Penn Water does not need to serve its Pennsylvania wholesale customers and its retail customer, the Pennsylvania Railroad Company.

In our counter-statement above, we point out that the two opinions below as well as the pleadings absolutely refute any concept of the sale of all of Penn Water's output to Consolidated.

As shown in the record (Vol. I, pp. 116-117), the present Pennsylvania customers (or their corporate predecessors) have been served by Penn Water continuously from dates long prior to the 1931 agreement. The agreement of 1931 expressly subordinates Consolidated's entitlement to the contractual needs of **existing** customers and to the contractual needs of future customers.

If the converse were true, i. e. if Consolidated is buying all of Penn Water's energy then Consolidated is in effect doing business in Pennsylvania without having qualified to do so.

The clear meaning of the agreement is that Consolidated buys whatever energy Penn Water has not contracted to sell elsewhere. (Vol. I, p. 60). Maryland Commission's tortuous reasoning is obviously without merit. To reiterate the contention made in our brief in opposition to Consolidated, the Pennsylvania Commission's minimum and undisputed jurisdiction over the direct sale at retail to the Pennsylvania Railroad Company (**Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, et al.,** 332 U. S. 507 (1947)) is sufficient to give Pennsylvania a direct interest in the questioned agreement and in keeping Penn Water free to give that company adequate service at reasonable rates.

Conclusion

Penn Water does not sell all its energy to Consolidated but only what remains after sales to its own customers under existing contracts, and Pennsylvania Commission clearly possesses regulatory power over Penn Water. For these reasons and for those advanced in our brief in opposition to Consolidated's petition for writ of certiorari, both petitions should be denied.

Respectfully submitted,

LLOYD S. BENJAMIN,
THOMAS M. KERRIGAN,
CHARLES E. THOMAS,
Counsel for Respondent, Pennsylvania Public Utility Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 424

JOHN H. HESSEY, FRANK HARPER,
AND OLIN R. HIGGINS,
CONSTITUTING THE
PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioners,

VS.

PENNSYLVANIA WATER AND POWER COMPANY,
AND
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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of Maryland.

The Daily Record Co., Baltimore 3, Md.

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AND
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

John H. Hessey, Frank Harper, and Olin R. Higgins, constituting the Public Service Commission of Maryland, petitioners (Maryland Commission), pray for the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, to review a judgment of that Court

dated September 30, 1950, which reversed a judgment of the United States District Court for the District of Maryland dated February 28, 1950.

I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Pennsylvania Water and Power Company (Penn Water) brought suit in the District Court for a declaratory judgment that a long-term electric energy sales contract dated June 1, 1931, between it and Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated), was invalid. The Maryland Commission, in order to assert the interests of the electric consuming public of Maryland, was permitted to intervene in these proceedings as party defendant, and the Pennsylvania Public Utility Commission (Pennsylvania Commission) intervened as a party plaintiff. The District Court, after trial, in a carefully considered and comprehensive opinion, held the contract valid in every respect. The Court of Appeals reversed and remanded the case for the entry of a declaratory judgment that the contract was invalid on its face, upon the following grounds:

1. That the contract was *per se* in restraint of trade, in violation of the Sherman Act, 15 U. S. C., Sec. 1.

2. That the provision of the contract which permitted Consolidated to approve purchases by Penn Water, of electric energy from others, violated Sec. 3 of the Clayton Act, 15 U. S. C., Sec. 14.

3. That the contract required, but did not have, the approval of the Pennsylvania Public Utility Commission and, therefore, violated Sec. 3 of Art. III of the Public Service Company Law of Pennsylvania, July 26, 1913, Pamphlet Laws 1374; and

4. That the contract was contrary to the public policy of Pennsylvania.

Thus, the Court of Appeals decided four important questions of Federal law in a way apparently in conflict with applicable decisions of the Supreme Court of the United States, and two subordinate questions of Pennsylvania State law in a way apparently conflicting with the law of that State.

The opinion of the District Court is reported in 89 F. Supp. 452, and appears in the Record in Vol. I, page 1. The opinion of the Court of Appeals has not yet been reported, but appears in Vol. III, page 75, of the Record.

Interest and Position of the Maryland Commission

The main feature of the contract in question is that it provides, over a long period of years, for the sale of all of Penn Water's energy to Consolidated at wholesale in interstate commerce, and thus assures Consolidated and its Maryland consumers of an assured supply of hydro energy. Every other provision of the contract (including the restrictions upon Penn Water which the Court of Appeals found objectionable) are incidental to that main feature.

In return for this energy, Consolidated guarantees Penn Water the recovery of all of its operating expenses, including annual depreciation and taxes, and a return on its investment. Consolidated, as the purchaser and owner of all of this energy, is entitled to be credited with any money realized from the sale of any of its own energy, and thus has the right to approve or disapprove Penn Water's disposition of any of it to others. Consolidated, since it is obligated to purchase and pay for all of Penn Water's energy, including that which Penn Water purchases from others, is given the right to approve or disapprove such outside purchases. Consolidated, since it must pay Penn Water an annual return on any investment which Penn Water may make in additional plant, and the annual cost of operating the same,

has the right to approve or disapprove large plant additions by Penn Water. All of these last mentioned provisions are terms of the interstate sale. Taken together as a whole, they govern the compensation which Penn Water receives for the sale of its energy in interstate commerce.

Another important consideration is the fact that Penn Water is and has always been a wholesale supplier located in Pennsylvania. Consolidated is primarily a retail distributing company in Baltimore, Maryland, and has no operations in Pennsylvania. Thus, these two companies are not and could not be competitors, either actual or potential.

Since Penn Water is a "licensee" and a "public utility" within the meaning of the Federal Power Act, this interstate sale at wholesale is subject to the jurisdiction of the Federal Power Commission. And since the contract in question governs that interstate sale at wholesale, it follows that the contract itself, with all of its terms and provisions, is Penn Water's tariff; and it has been filed as such for years with the Federal Power Commission.

It was for that reason that the Maryland Commission, believing that the cost to Consolidated of Penn Water's energy, as determined by this contract, was excessive and therefore prejudicial to Consolidated and the Maryland consuming public, invoked the jurisdiction of the Federal Power Commission in 1944 over this filed tariff and the rates which it specified. The Federal Power Commission, at the instance of the Maryland Commission, assumed jurisdiction and after a long hearing in which this contract was fully considered and highly praised as being in the public interest, except for the amount of Penn Water's compensation thereunder, reduced all of Penn Water's rates. See *In the Matter of Pennsylvania Water and Power Company,* FPC Docket IT-5915, decided January 4, 1949, rehearing

denied February 28, 1949. By this order, the rates payable by Consolidated to Penn Water were reduced in an annual amount of $1,733,318 and the order was therefore of incalcuable benefit to the Maryland consumers who are retail consumers of Consolidated. Except for reducing the rates, the Federal Power Commission determined that "the present arrangement (the contract in question) * * * is the most practicable under the circumstances. That arrangement will therefore be continued with, however, such modifications as are necessary to accomplish the reductions mentioned above * * *."

In denying Penn Water's petition for rehearing in the proceeding involving its rates, *In re Pennsylvania Water and Power Co.,* FPC Docket IT-5915, in Opinion 173A, February 28, 1949 (p. 6), the Federal Power Commission, referring to Penn Water's allegations of illegality of the Basic Agreement and Penn Water's intent to change operations thereunder, said *"all of the carefully built benefits* of pool design, investment, construction, and operation apparently *are intended to be sacrificed* by Penn Water" (italics supplied). This the Commission refused to permit; but, if the ruling of the Court of Appeals is permitted to stand, Penn Water will immediately seek to carry out what the Federal Power Commission has already found to be contrary to the public interest.

The above described Orders and Opinions of the Federal Power Commission are now pending review in the United States Court of Appeals for the District of Columbia. On November 22, 1950, Penn Water filed in that proceeding a motion to postpone the date of oral argument and to postpone the time for filing of a reply brief "for such time after final action by the Supreme Court of the United States on the decision of the United States Court of Appeals for the Fourth Circuit" (in the instant proceeding), as might seem

reasonable to the Court therein. In its motion aforesaid, Penn Water argues that if this application for certiorari herein be denied, or if the decision of the Court of Appeals for the Fourth Circuit be affirmed, the considerations upon which the Federal Power Commission's Orders were based "would be legally and factually untenable" and the issues raised in those appeals from the Federal Power Commission Orders would, in consequence, become "moot"; and further, that the Federal Power Commission's determinations as to its jurisdiction and the control asserted over Penn Water's rates and charges would be "invalid and illegal at the time the Commission's determinations were made". Those statements are further and emphatic reasons why this Court should grant certiorari in this proceeding, reverse the Court of Appeals, and rule that any and all questions as to the nature of Penn Water's operations, contractual and otherwise, be reviewed only in the orderly manner provided by the Federal Power Act and as required by long standing doctrines of administrative law.

In a "Statement of Position", filed in the District Court in response to that Court's request, (printed in its entirety, R. Vol. II, pages 52-69), the Maryland Commission shows that Penn Water's repudiation of the Basic Agreement in the instant suit was "but a single step in a series of actions engaged in * * * by Penn Water to defeat the jurisdiction of the Federal Power Commission and to avoid a rate reduction to Consolidated that has been long overdue". That Statement sets forth the Maryland Commission's efforts, throughout that series of actions, to protect the Maryland public against the very injurious effects of such actions by Penn Water.

The Statement describes the substantial public benefits which have resulted from the Basic Agreement; the representations regarding these benefits which have been made

to the Maryland Commission by Penn Water; our Commission's request in 1938 that Consolidated's annual payments under the Basic Agreement be reduced $600,000, which was voluntarily agreed to by Penn Water and Consolidated under the Basic Agreement (see Supplemental Agreement of Sept. 29, 1939, Pl. Exh. 7, p. 41) and resulted in a $1,000,000 rate reduction to the Maryland public; our Commission's subsequent request in 1944 that the Federal Power Commission investigate the rates under the Basic Agreement; Penn Water's position in that case and its effort to deny to Maryland consumers Consolidated's contractual two-thirds share of the output of Safe Harbor (under a companion agreement entered into in 1931 by Penn Water, Consolidated, and Safe Harbor for the development of the Safe Harbor Hydro-Electric project); the Federal Power Commission's Order of November 4, 1946, reducing Safe Harbor's rates by approximately $600,000 annually (later affirmed on appeal in *Safe Harbor Water Power Corp. v. F. P. C.*, 179 F. 2d 179 (C. C. A. 3, 1949) cert. denied by this Court May 15, 1950, 339 U. S. 957); the rate case instituted against Penn Water (and later against Safe Harbor) by the Public Utility Commission of Pennsylvania; that Commission's Order of September 27, 1948, acquiesced in by Penn Water, reducing the alleged "joint rates" of those two companies to public utility company customers in Pennsylvania by $1,170,000, all of which reduction would have been *a direct charge against Consolidated and its Maryland customers* under the terms of the Basic Agreement; the injunction issued against such rate order on February 4, 1949, by a three-judge Federal District Court for the Middle District of Pennsylvania, from which injunction neither the Pennsylvania Commission nor Penn Water sought an appeal; the Federal Power Commission's Order of January 5, 1949, reducing Penn Water's rates by $2,000,000 and allocating approximately $1,700,000 thereof to Maryland; the participation of the Maryland Commis-

sion in preventing Penn Water's dislocation of the interstate electrical interconnections established by the Basic Agreement; and, finally, the substantial harm that would ensue to the public of Maryland from the abrogation of the Basic Agreement.

Penn Water's present action to terminate the Basic Agreement must be viewed against this background.

During the nearly two score years of system-wide operations under the Basic Agreement, the Maryland Commission has regarded this Agreement as creating economies and reliability of service not otherwise obtainable, and as being wholly in the public interest. Penn Water has consistently, until the present action, so represented it to the Maryland Commission, to its own stockholders, and to the Federal Power Commission. (See quotations in Consolidated's Motion for Temporary Restraining Order, Pars. "1" and "2", R. Vol. II, pages 128-132; as admitted in Penn Water's Answer, Par. II, 3, 4, and 5, Transcript of Record, Vol. I, page 322, et seq.)

The Basic Agreement has been on file, since soon after its execution, with the Maryland Commission, the Pennsylvania Commission, and as above stated, with the Federal Power Commission. It has been considered separately by all three Commissions on several occasions and also by the Courts.

Its legality or its benefits to the public as a contract have never been questioned until the present case. Penn Water now has repudiated not only the Basic Agreement but its entire course of conduct thereunder since 1931, including the formal representations regarding that contract which it has made to the Maryland Commission, to inform the latter and to influence its action. In 1938, in the hearings before representatives of the Maryland Commission leading

to the voluntary reduction above referred to, Penn Water joined with Safe Harbor in a written statement to the Maryland Commission regarding the Basic Agreement, saying:

> "The form of contractual arrangements between the companies is the outcome of two decades of developing experience, and the managements stand ready to contend that it is the most suitable one in the circumstances and that it does not contain any features inimical to the public interest." (R. Vol. II, pages 57, 130; admitted by Penn Water in its Answer to Motion, Par. II, 4, Transcript Vol. I, page 322, et seq.)

The Maryland Commission accepted that statement in 1938 and agrees with it now. The invalidation of that contract by the Court below presents a question of broad interstate and national significance which should be reviewed by this Court, more particularly for the reasons which follow in detail, in part iv of this petition.

II. JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari rests upon the provisions of U. S. C. Title 28, Sec. 1254.

III. QUESTIONS PRESENTED

1. Is the long-term contract dated June 1, 1931, which prescribes the terms and conditions under which Consolidated purchases electric power and energy from Penn Water at wholesale in interstate commerce, *per se* in violation of the Sherman Act; or is it subject to the rule of reason, and therefore valid, because the restrictions which it imposes are reasonable and in furtherance of the public interest?

2. Is the provision of this long-term contract which permits Consolidated to approve Penn Water's purchases of power and energy from others and which under the terms of the contract Consolidated is obligated to pay for, in violation of Sec. 3 of the Clayton Act?

3. Is the question of the validity of this long-term contract, which constitutes Penn Water's tariff on file with the Federal Power Commission, a matter within the exclusive primary jurisdiction of the Federal Power Commission?

4. In view of the Commerce Clause of the Constitution of the United States, does this long-term contract for the interstate sale of power and energy at wholesale require the approval of the Pennsylvania Public Utility Commission?

5. In view of the Commerce Clause of the Constitution of the United States, is this long-term contract for the interstate sale of power and energy at wholesale required to be within the public policy of the State of Pennsylvania?

6. If the approval of the Pennsylvania Public Utility Commission is constitutionally required to make this interstate contract valid, does it in fact have that approval by reason of acquiescence therein by the Pennsylvania Public Utility Commission over a long period of years?

7. Does this long-term contract as a matter of State law offend the public policy of the State of Pennsylvania?

IV. REASONS FOR GRANTING THE WRIT

The principal reason which should induce this Court to review the decision of the Court of Appeals, the Maryland Commission submits, is that the Court of Appeals has stricken down, on highly questionable legal grounds, an important contract which has been given the long-standing

approval of the regulatory bodies that considered it as being in the public interest. It has stricken this contract *on its face*, admittedly without giving any weight whatsoever to the great benefits and advantages to the public, which were the purpose and demonstrated effect of the contract. In doing so, it has aided Penn Water in its avowed objective to escape the jurisdiction and regulation of the Federal Power Commission. In doing so, it has placed in jeopardy the necessary and otherwise assured supply of hydro energy to the Maryland public. In doing so, it has placed in jeopardy a rate reduction which was long overdue, and to which the Maryland consuming public is entitled.

It is submitted that the Court of Appeals misconstrued and misapplied this Court's decisions as to what constitutes a restraint of trade illegal *per se*. Of course, any concerted tampering with the *market price structure* cannot be justified. *Socony-Vacuum Oil Co., Inc. v. United States*, 310 U. S. 150; *United States v. Trenton Potteries Co.*, 273 U. S. 392. But obviously, concerted action whereby the producer of the energy and the purchaser thereof agree upon a price for the energy sold, is not *market price fixing*. If it were, every contract for purchase and sale would be *ipso facto* illegal. And yet that, in substance, is the intention and effect of the contract in question. Under it, Consolidated, as the real owner of all of the energy produced or purchased by Penn Water, has the discretion or decision as to the prices at which it will permit its own energy to be sold. And even here, Consolidated has not the last decision, because all such prices are subject to public regulation. The decisions of this Court requiring application of the rule of reason to such a transaction have been ignored by the Court of Appeals.

The Court of Appeals held that Consolidated's right of approval over Penn Water's outside purchases of power was violative of Section 3 of the Clayton Act. Power pur-

chases by Penn Water serve no purpose other than to contribute to the over-all supply of the contractual power-pool; all at Consolidated's expense. If the Basic Agreement is to be judged on its face (as the Court of Appeals did), it must be so judged in its entirety. The contractual requirements of economic utilization of power resources (Article VIII of the Agreement, R. Vol. 1, page 66) re-enforces and emphasizes the true character of the provision under discussion; i.e., one of economy and efficiency. Furthermore, the provision in question is not a tying-clause to enable Consolidated to reserve a market for itself within the meaning of Section 3 of the Clayton Act. Clearly, the restriction has been inserted to protect Consolidated from being forced to purchase and pay for electric power which it may not need, or the purchase of which may be uneconomical.

Again, the decision of the Court of Appeals that the District Court had jurisdiction to strike down this contract gives no effect to the statutory jurisdiction of the Federal Power Commission over a tariff filed with it, which prescribes the give and take terms of an interstate sale of energy at wholesale. Section 206 of the Federal Power Act (16 U. S. C., Sec. 824e), which in terms subjects the reasonableness of a public utility's "contract affecting such rate, charge or classification" to the jurisdiction of the Commission, and authorizes it to "determine the just and reasonable * * * contract to be thereafter observed and in force" and "to fix the same by order", is not even alluded to by the Court of Appeals. The Commission's statutory power to determine whether Penn Water should have a "license", and the Commission's determination that such a license should issue notwithstanding the Basic Agreement and the provisions of Sec. 10(h) of the Act (16 U. S. C., Title 16, Sec. 803(h)), is given no effect whatever. The Commission's later determination, in a lengthy proceeding involving

Penn Water's rates *under this very Basic Agreement* (see *In the Matter of Pennsylvania Water and Power Company*, FPC Docket IT-5915, decided January 5, 1949, rehearing denied February 28, 1949), that the Agreement should be continued in effect as reasonable and in the public interest, except as modified by the rate order, is passed over as irrelevant.

Instead, the Court of Appeals turns down the primary jurisdiction of the Federal Power Commission over the Basic Agreement by relying upon *U. S. Alkali Export Ass'n., Inc. v. United States*, 325 U. S. 196, and *United States v. Borden Co.*, 308 U. S. 188. We submit that these cases are not controlling. In the *Alkali Export Ass'n.* case, the jurisdiction of the Federal Trade Commission under the Webb-Pomerene Act, completely unlike that of the Federal Power Commission under the Federal Power Act, was limited to the investigation of violations and a recommendation of their prosecution. In the *Borden Co.* case, the Secretary of Agriculture, while he had administrative jurisdiction over some of the parties to the over-all conspiracy charged, was completely lacking in jurisdiction over the principal parties to the alleged conspiracy. In the case at bar, the authority of the Federal Power Commission extends to the entire transaction in question, the interstate sale of energy at wholesale between two parties, both of which are "public utilities".

Furthermore, the Court of Appeals, in relying on the *Georgia v. Pennsylvania R. Co.* case, 324 U. S. 439 (1945) for the proposition that "regulated industries are not *per se* exempt from the Sherman Act", overlooks completely (1) the fact that four justices dissented in that case; and (2) that the majority opinion carefully emphasized that it was dealing only with a suit to enjoin a conspiracy, *not with an attempt to set aside a filed tariff*, which even the majority